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UNITED STATES OF AMERICA

in the

Supreme Court of the United States

OCTOBER TERM, 1946

No. 298

JAMES A. BYERLY,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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TABLE OF CASES CITED

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Petition for a Writ of Certiorari to the United States Circuit Court of Appeals For the Sixth Circuit

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Petitioner, JAMES A. BYERLY, respectfully represents that:

SUMMARY STATEMENT OF MATTERS INVOLVED

The question of law involved in this case is whether the income of an irrevocable, long term family trust established by the petitioner as grantor should be taxed to him upon the doctrine set forth in *Helvering vs. Clifford,* 309 U. S. 331, under Section 22 (a) of the Internal Revenue Code,

where no control nor rights whatever were reserved by the grantor in the indenture of trust with respect to the corpus or income of the trust and where there was no power of reverter.

The taxes involved for the years in question (1937-1941) aggregate in excess of One Hundred Seventeen Thousand ($117,000.00) Dollars. If the decision below is applied to later years up to the present date, the deficiency would total upwards of Four Hundred Thousand ($400,000.00) Dollars.

In the trust at bar there was a complete transfer of the title to three trustees, being the wife of grantor and two of his business associates (R. 50); the term was for the lives of the wife and two minor children of the settlor; there was no reversion to the settlor; the trust was irrevocable and unalterable; the settlor reserved no control or right whatever over the corpus or the income of the trust (R. 84-86). The wife of the settlor was one of the trustees and also was one of the beneficiaries and hence had a substantial adverse interest; the settlor continued to provide for the support, maintenance and education of his wife and minor children (R. 88); none of the factors which controlled in the case of *Helvering vs. Clifford,* supra, were existent; the corpus of the trust (corporate stock) was issued in the name of the trustees, was deposited in a safety deposit box in which only the trustees had access; and the bank account was in the name of the trustees who alone had the power to withdraw funds so on deposit (R. 55, 65).

In essence the fundamental question involved in the case at bar, as a question of law, is the same as though the

husband settlor had given stock in his corporation outright to his wife and to his two minor children, who as a result of the gift owned a majority of the outstanding stock of the corporation of which the husband settlor was president. If the decision of the lower court stands as a question of law, then the numerous and repeated present-day transactions whereby a husband makes an outright gift of a substantial portion of the stock of a corporation, previously controlled by the husband, to his wife and/or children, will be subject to the provisions of Section 22 (a) I. R. C., as to the dividends from the stock so given. Such a conclusion may well be reached based on the reasoning applied to the case at bar by the Tax Court and the Circuit Court of Appeals. In this respect the question of law involved has never been decided by this court and should be for the benefit of all taxpayers and their counsel.

STATEMENT DISCLOSING BASIS FOR JURISDICTION

This court has jurisdiction under 28 U.S.C. 347.

The statutes of the United States, the validity of which are here involved, are Sections 22 (a); 162 (b); 166; and 167 I.R.C. Section 22 (a) defines "gross income" as including income derived from businesses "whether real or personal, growing out of the ownership or use of or interest in such property." Sections 162, 166 and 167 state the manner in which the net income of a trust shall be computed, with special reference to revocable trusts in the case of Section 166 and income from a trust resulting to the benefit of the grantor in Section 167.

The decree of the United States Circuit Court of Appeals for the Sixth Circuit herein sought to be reviewed was decided April 17th, 1946, and this application for writ of certiorari will be presented within ninety days thereafter.

The case at bar involves an irrevocable long term family trust with no rights, powers or control whatever reserved to the settlor and raises a question of law upon which several of the Circuit Courts of Appeal are in conflict, i. e.:

In the Second Circuit, *Phipps vs. Commissioner,* 137 Fed. 2d, 141, the facts are very similar to the case at bar; no powers were reserved by the grantor in a long term, irrevocable, family trust although the husband grantor, in effect acted as co-trustee with his wife who was one of the beneficiaries. The Clifford doctrine was not applied by the Second Circuit because it found as a matter of law that the husband could not control the trust. Likewise and to the same effect the Second Circuit in the recent case of *L. A. Cushman, Jr., vs. Commissioner,* 153 Fed. 2d, 510, decided January 14, 1946, reversed the Tax Court on the theory that a family trust similar to the case at bar presented a question of law reviewable under *Dobson vs. Commissioner,* 320 U. S. 489, and the court held as a question of law that the income of the family trust should not be taxable to the husband settlor.

The decision of the Tenth Circuit in the case of *Armstrong vs. Commissioner,* 143 Fed. 2d, 700, the decision of the First Circuit in *Commissioner vs. Branch,* 114 Fed. 2d, 985, and the decision of the Seventh Circuit in *Commissioner vs. Betts,* 123 Fed. 2d, 534, each held as a question of law that the income from the irrevocable, long term, family trusts there involved were not taxable to the settlors, because of the lack of control reserved.

In the case at bar, the Sixth Circuit for the first time, holds that an irrevocable long term family trust with no reservation of control of the trust res and with no power of reverter comes within the doctrine of the Clifford case, with one justice dissenting, and thus is in definite conflict with the decisions of other Circuit Courts of Appeal.

The question of law involved in the case at bar is substantial in that it is the first decision by any court of record which invokes Section 22 (a) with respect to an irrevocable long term family trust with no reservation of control and no power of reverter. As such it is far reaching in that the same principle (the controlling principle of *Tower vs. Commissioner*, 66 S. Ct. 532), can be applied with equal logic to a husband grantor in a closely held corporation with respect to stock in said corporation which he gives outright to his wife and/or minor children.

QUESTIONS PRESENTED

I.

After the creation of the trust did the petitioner retain such right, or retain any right, as to be still the owner of the property transferred within the meaning of Section 22 (a) of the Internal Revenue Code so that the income from such property remained taxable to the petitioner?

The tax court and the Circuit Court of Appeals both determined that the petitioner in effect remained the owner of the trust property and therefore was taxable on the income therefrom.

II.

Should the husband grantor of an irrevocable long term trust with no reservation of control over the trust res and with no power of reverter be charged with the income from such trust as a question of law?

The tax court and the Circuit Court of Appeals both held in the affirmative.

REASONS FOR ALLOWANCE OF WRIT

Certiorari should be granted for the following reasons:

1. The decision of the Circuit Court of Appeals in the case at bar is in conflict with decisions of other Circuit Court of Appeals on the same matters, i. e.:

(a) The decision of the First Circuit in *Commissioner vs. Branch*, 114 Fed. (2), 985.

(b) Decision of the Second Circuit in *L. A. Cushman, Jr., vs. Commissioner*, 153 Fed. (2), 510.

(c) In the decision of the Seventh Circuit in *Commissioner vs. Betts*, 123 Fed. (2), 534.

(d) In the decision of the Tenth Circuit in *Armstrong vs. Commissioner*, 143 Fed. (2), 700.

In certain of the above cases although the husband settlor retained powers in the trust indenture over the corpus and

income of the trust, they were held to be so negligible that they did not make the income of the trusts taxable as his own as a question of law within Section 22 (a) as construed in the Clifford case; whereas the Sixth Circuit, in the instant case, held that the income was taxable to the grantor notwithstanding the fact that there were no retained powers in the trust indenture over either the corpus or the income and no power of reverter.

2. The court below has decided an important question of federal law which has not been, but should be settled by this court, in that the court below has determined that the income from a long term irrevocable trust with no reservations of control whatsoever over the trust res or the income therefrom, with no power of reverter, and with no retained powers whatsoever over either the corpus or the income is taxable to the grantor under Section 22 (a) I.R.C., as a question of law. This important question of federal law should be settled by this court.

3. The court below has decided a federal question in a way probably in conflict with the only applicable decisions of this court, in that this court:

(a) In *Helvering vs. Clifford,* supra, taxed the grantor with the income of a short term (five-year) trust for the benefit of his wife, wherein the grantor reserved full power over the corpus and the absolute right to the corpus and income thereafter; and

(b) In *Helvering vs. Stuart,* 317 U. S. 154, determined that the reservation by the grantor of power to change beneficiaries (to one other than the grantor), and to direct sale of the trust corpus and reinvest

the proceeds, coupled with the fact that the grantor's wife and brother were named as trustees, did not require the taxation of the income from such family trust to the grantor.

4. The court below has decided an important question of local law in a way probably in conflict with applicable local decisions in that it has decided that the powers of the trustees in the trust at bar could be employed for their own benefit or for the benefit of the grantor although this holding is directly in conflict (i) with the terms of the indenture of trust, (ii) with the applicable statutes of the State of Michigan (Sec. 26.76; 26.114; and 26.129 Michigan Statutes Annotated), and which impose a duty to enforce the trust powers, require all the trustees to unite in the execution of such powers and authorize removal of any trustee who shall have violated or threatens to violate his trust, (iii) with the decisions of the Supreme Court of Michigan; i. e., *Culhane's Estate*, 269 Mich. 68, holds that the powers of a trustee are powers in trust and must be exercised for the benefit of the trust; and *Kelsey vs. Detroit Trust Company*, 265 Mich. 358, holds that a trustee can be removed, independent of any statute, for any misconduct, incapacity or for other good cause by any person interested in the execution of an express trust.

5. The decision of the Circuit Court of Appeals has in effect decided an important question of federal law which has not been, but should be, settled by this court, in that the effect of its decision is to charge the husband grantor with the income from shares of stock registered in the name of his wife, and/or minor children which were acquired by outright gift from the husband who owned and controlled a closely held corporation. This question has not

been settled by this court and is of the utmost and vital interest to taxpayers, members of the bar and administrative officers of the government. It therefore constitutes a question of general and public importance which only this court can resolve and determine.

6. The court below has decided a federal question in a way probably in conflict with applicable decisions of this court in determining that the ownership of trust property, where the facts are undisputed, is a question of fact within the sole province of the Tax Court, rather than a question of local law. The decision is a misapplication of *Dobson vs. Commissioner,* 320 U. S. 489, and is in conflict with the decision of this court in *Helvering vs. Stuart,* 317 U. S. 154, wherein this court held that local law with respect to the nature and ownership of trust property should be adopted and followed.

Wherefore, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, to the end that said cause may be reviewed and determined by this court as provided by law, that petitioner have such other and further relief in the premises as to this court may seem appropriate, and that judgment of said Circuit Court of Appeals be reversed by this honorable court.

James A. Byerly,
Petitioner.

By: Lee E. Joslyn, Jr., and
Alan W. Joslyn,
Attorneys for Petitioner.

UNITED STATES OF AMERICA

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No.........

JAMES A. BYERLY,

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Brief In Support of Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit

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I.
OPINIONS BELOW

The Circuit Court of Appeals rendered its opinion in this case on April 17th, 1946. Such opinion is reported in 154 Fed., 2nd, 879.

The findings of fact and memorandum opinion of the Tax Court in this case was entered on March 21st, 1944, and may be found at pages 82-93 of the record.

II.

JURISDICTION

Certiorari is prayed and jurisdiction is invoked under 28 U.S.C. 347 on the grounds that:

(1) The Circuit Court of Appeals for the Sixth Circuit has rendered a decision in conflict with other Circuit Court of Appeals on the same matter.

(2) The court below has decided an important question of federal law which has not been, but should be settled by this court.

(3) The court below has decided certain federal questions in a way probably in conflict with the applicable decisions of this court, and

(4) The court below has decided an important question of local law in a way probably in conflict with the applicable local decisions.

III.

QUESTIONS PRESENTED

1. After creation of a long-term irrevocable family trust with no reservation of control by the grantor over the trust res or income therefrom, and with no power of reverter, did petitioner as grantor retain such rights as to be the equivalent of ownership of the property transferred within the meaning of Section 22 (a) of the Internal Revenue Code so that the income from such property remained taxable to the petitioner?

2. Should the husband grantor of an irrevocable long-term trust for the benefit of his wife and minor children, wherein the grantor did not reserve any control over the trust res or the income and did not reserve any power of reverter, and such facts are undisputed, be charged with the income from such trust as a question of law?

IV.

ASSIGNMENTS OF ERROR

1. The Circuit Court of Appeals erred in affirming the decision of the Tax Court.

2. The Circuit Court of Appeals erred in failing to make an independent determination of the question of law as to the ownership of the trust property.

3. The Circuit Court of Appeals erred in holding the income of the trust taxable to petitioner under Section 22 (a) I.R.C.

4. The Circuit Court of Appeals erred in holding that the income of the trust was taxable to petitioner under *Helvering vs. Clifford,* 309 U. S. 331.

5. The Circuit Court of Appeals erred in holding that the income of the trust was taxable to petitioner within the controlling principle of *Tower vs. Commissioner,* 66 S. Ct. 532.

6. The Circuit Court of Appeals erred in holding that the income of the trust was taxable to petitioner where he, as settlor, reserved no control or power over the trust res or income therefrom.

7. The Circuit Court of Appeals erred in failing to recognize that powers of the trustees were powers in trust for the benefit of the trust only.

8. The Circuit Court of Appeals erred in failing to consider local rules of property and trust administration regarding the legal effect of the terms of the trust and the powers of the trustees.

V.

ARGUMENT

(A) STATEMENT OF FACTS PRESENTED

The following points of fact are presented, namely:

1. *Transfer of res.*

Title to the trust res was wholly and completely transferred to the trust, the shares of stock (Res) being issued in the name of the trustees. Such transfer carried with it the right to receive dividends on said stock. Grantor retained neither title to nor the income from the trust res.

2. *Term of trust.*

This trust was not a term trust within the Clifford definition. On the contrary it extended even beyond the life of the grantor, being for the life of his wife and two minor children and for twenty-one years thereafter. The trust did provide for earlier termination upon the written consent of each of the beneficiaries then entitled to the benefits of the trust estate, but this court in ***Helvering vs. Helmholz***, 296 U. S. 93, held in effect that such a provision is superfluous in any irrevocable trust.

3. *The trust is irrevocable.*

The indenture of trust expressly provides that it is irrevocable and not subject to change by the grantor.

4. *Grantor reserved no control.*

In the trust instrument, the grantor reserved no right whatsoever with respect to the control, management or disposition of either the corpus or the income of the trust.

5. *No power of reverter was reserved by the grantor.*

Under the indenture of trust no power of reverter was retained or reserved by the grantor.

6. *Income from trust not used for family support.*

The trust instrument allocates one-third of the net income to each of the three beneficiaries, with power in the trustees either to distribute or accumulate such income. Each beneficiary account was credited with income on the trust books (R. 89). It is undisputed that grantor had ample income and ability to support, maintain and educate his wife and minor children, and he continued so to do notwithstanding the creation of the trust.

7. *Trustees were natural choice.*

Grantor recognized that the trust property consisted of shares of stock in a corporation, and that it was natural to name two trustees who were familiar with the business of the corporation. As a safeguard it also was natural for him to name his wife as the third trustee, as she had a substantial adverse interest as one of the beneficiaries, and as trustee had the right to remove the other trustees should they subsequently be unsuitable or violate the trust. Powers vested in the trustees must be executed by unanimous action

under section 26.129 Michigan Statutes Annotated. This provided safeguards to the grantor with respect to management of the trust.

8. *Grantor logical choice as President.*

Even though a disinterested corporate trustee had been named, economic necessity and good business judgment would have required the corporate trustee to continue grantor as the active president of the corporation so long as he was willing so to do. To such an extent as president of the corporation, grantor remained in control of the corporation, but he also was subject to removal at any time by the trustees who owned a majority of the outstanding stock.

9. *Trustees had right to name successors.*

Under the trust indenture the trustees had the sole right to fill vacancies by appointment, and then only by unanimous consent of the remaining trustees.

(B) STATEMENT OF LAW PRESENTED

1. *Summary.*

The primary question presented to this court for determination is whether the income from an irrevocable long term family trust with no reservation of control over the trust res or income therefrom, and with no power of reverter should be charged to the grantor as a question of law under the doctrine set forth in *Helvering vs. Clifford,* 309 U. S. 331.

2. *Legal questions presented.*

The following points of law will be presented, namely:

1. The Clifford case.

2. The Tower case does not control.

3. The grantor did not remain the owner of the trust property and is not taxable on the income therefrom under section 22 (a) I.R.C.

4. The Dobson case.

The above points of law will be discussed in order, namely:

1. The Clifford Case

To show the error of the Sixth Circuit in the case at Bar, and the conflict of its decision with other lower courts under the Clifford case, the three factors controlling in the Clifford case are discussed in order.

(a) Length of Term.

The circumstances in the case at bar do not come within the Clifford doctrine by any stretch of argument. Here, the trust indenture is irrevocable and continues for three lives in being (grantor's wife and two minor children), and until the youngest of any living lawful issue of the last surviving beneficiary reaches the age of twenty-one (21) years. The trust may be terminated earlier upon the written consent of each of the beneficiaries then entitled to the benefits of the

trust estate. The cases are uniform however that this latter provision is superfluous in any irrevocable trust as admittedly such a trust could be terminated and the corpus and income given to the grantor by the beneficiaries should they all so agree. To hold otherwise would disregard the fundamental property rights of every individual to sell or dispose of the same, either by gift or otherwise.

Mertens, Law of Federal Income Taxation, Volume 6, page 331, states the rule as follows:

> "Since the general law is that all parties in interest may terminate a trust, a reservation of that power in the instrument does not vary the effect of the trust."

To the same effect see:

> *Helvering vs. Helmholz,* 296 U. S. 93, 80 L. Ed. 76, 56 S. Ct. 68 (1935);
>
> *Commissioner vs Bacher,* 6 Cir., 102 F. (2) 500, M.S.A. 27.2101; C. L. Mich. 29,15084.

Should all of the beneficiaries named in the trust die leaving no living lawful issue, then the trust shall terminate and the trust estate thereupon shall be distributed to the grantor if he be living. This, however, does not constitute a so-called "short-term trust," such as was considered in the Clifford case, supra, where the trust specifically terminated at the end of five years. See *Suhr vs. Commissioner,* 6 Cir. 126 F. (2d) 283.

The trust here in question therefore is a long-term trust and the first of the controlling circumstances under the Clifford doctrine should be disregarded.

(b) Family Relationship.

Admittedly petitioner here created a so-called family trust where the income stays in the family group. However, the grantor irrevocably reserved to himself no powers whatsoever, either directly or indirectly, to control or direct the management or disposition of the income and/or corpus, either by gift or otherwise. This was not the situation in the Clifford case where the disability to make a gift of the corpus or income existed for only five years.

It cannot be successfully argued that no substantial economic change occurred as far as grantor is concerned, when he established an irrevocable long-term trust. It is true that the income remained in his family, but such action did not relieve the grantor of his obligation to them. The record discloses ample income and ability on the part of the grantor to continue support, maintenance and education of his family which is a legal liability under the Statutes and decisions of the State of Michigan.

In Michigan by statute the parent is required to maintain and support his children.

M.S.A. Sec. 16.130 (C. L. Mich. '29, 8217);

M.S.A. Sec. 16.131 (C. L. Mich. '29, 8218);

M.S.A. Sec. 28.358 (C. L. Mich. '29, 12788);

M.S.A. Sec. 28.362 (C. L. Mich. '29, 12781).

The obligation of the parent, who is able to support his children, is not affected by the fact that the child has an interest in a trust estate or has other property, and the

parent must perform his obligation without resorting to the child's separate estate.

> 39 Am. Jur. Sec. 44;
> M.S.A. Sec. 27.3178 (209).

In *Phipps vs. Commissioner*, 2 Cir. 137 F. (2d) 141, the husband created an irrevocable trust for the benefit of his wife and child, the court stating at page 144 that:

> "* * * the obvious purpose of the trust was that the wife was to receive a considerable part of the income * * *."

The court distinguished the Phipps case from prior cases in the second circuit, holding that it was not within the Clifford doctrine because, as the court well said, only by a disregard of the purpose of the trust "could the husband control the allocation of the income amongst the members of his family," adding the following significant statement which is most applicable to the facts and testimony of the case at bar.

> "Nothing in those cases (Clifford or Buck) suggests that a wife, who has an obviously selfish adverse interest in receiving income for herself, is so lacking in independence that it is to be conclusively presumed that she will exercise her powers as a trustee in accordance with the wishes of her husband." (Page 144.)

A definite and clear cut conflict of a question of law exists as between the Second Circuit in the Phipps case and in the case at bar with respect to the family relationship where no powers were reserved by the grantor.

(c) Control Reserved.

Under the decision of the Sixth Circuit in the case at bar, no conflict existed as a matter of law in the several circuits with respect to the conclusion of ownership resulting from definitive, or total absence of reservations by the grantor over the control, management and/or disposition of the corpus or income of the trust, provided such definitive reservations by the grantor have been found in the four corners of the trust indenture itself; for example, to cite only a few of the leading cases:

In *Helvering vs. Clifford*, supra, the grantor reserved full voting powers of the trusteed securities, he could exchange, mortgage or pledge them in his sole discretion, he reserved power to invest and reinvest, to make loans, to compromise claims and most important, he reserved the absolute right to the corpus and income after five years. It can be readily seen why this court held that "The bundle of rights which he (the grantor) retained was so substantial" (p. 337) that he must be treated as the owner. Obviously, the Clifford case hinged upon the retention of legal rights and control of the corpus reserved by the grantor in the trust indenture itself.

In *Commissioner vs. Buck*, 2 Cir. 120 Fed (2d) 775, the grantor reserved to himself during his life the power to alter or amend the provisions of the trust with respect to disposition of income and corpus, or both. The court held that even where the trust is of long duration, "the donor is to be regarded as the 'owner,' if he *expressly reserved* a very substantial measure of control of the disposition of the income —" (p. 778). (Our emphasis.) Based on the control expressly reserved in the trust indenture, the court

found as a conclusion of law that the grantor was the owner within the meaning of Section 22 (a).

In *Phipps vs. Commissioner,* Second Circuit, supra, no powers or control were reserved by the grantor in a long-term irrevocable family trust, although the court held that the husband grantor, in effect, acted as co-trustee with his wife who was one of the beneficiaries. The Clifford doctrine was not applied because the court found as a matter of law that only by a disregard of the express purposes of the trust—a disregard which would result in judicial intervention—could the husband control the trust.

In *Central National Bank of Cleveland vs. Commissioner,* Sixth Circuit, 141 Fed. (2d) 352, the grantor created four seven-year irrevocable family trusts. In three, he reserved no power or control whatsoever except the power to change the trustee in which event he was compelled to substitute a Cleveland Trust Company. In the fourth trust, the grantor reserved the power to direct the investment and reinvestment of trust funds. The Clifford doctrine was not applied to the three trusts but was to the fourth trust, because of the "reservation by the grantor of power to direct the investment and reinvestment of trust funds" (p. 356).

In *Mahaffey vs. Helvering,* 8 Cir. 140 F. (2d) 879, the grantor transferred corporate stock to himself, as trustee, for the benefit of his mother during her lifetime. The grantor reserved no powers in the trust indenture either to receive or control the income and the court therefore refused to apply the Clifford doctrine, saying at page 882:

> "* * * for the purposes of taxation, the income of a trust is attributable to the beneficiary where, by

the creation of the trust, the beneficiary acquires a present estate in the corpus of the trust beyond the power of the settlor to revoke * * *."

In *Commissioner vs. Katz*, 7 Cir. 139 F. (2d) 107, the husband executed long-term irrevocable trusts for each minor child with no reserved powers to the grantor in the trust indenture. The court distinguished the Clifford case and did not apply its doctrine because both the income and corpus of the trust were irrevocably and finally disposed of by virtue of the express terms of the trust instrument.

In *Armstrong vs. Commissioner*, 10 Cir. 143 F. (2d) 700, a father executed an irrevocable twelve-year trust for benefit of two of his minor children, naming himself as trustee with broad powers of control and management. No power was reserved by the grantor in the trust instrument either to revest in himself by reverter, revocation or otherwise, any portion of the corpus or income of the trust at any time. The court carefully distinguishes the above mentioned facts from those in the Clifford case, and found as a conclusion of law that the income from the trust should not be taxed to the grantor under Section 22 (a) because under the express terms of the trust, the grantor retained neither the power to revoke, revest nor revert either the corpus or the income of the trust.

The above cases illustrate clearly the present conflict on the question of law between several Circuits and the Sixth Circuit.

In the case at bar, the wife as one of the trustees and also as one of the beneficiaries had a substantial adverse interest in effect the same as though the shares of stock in question

had been given to her outright and had been registered in her name on the books and records of the corporation. Neither this court nor has Congress held that the husband donor is taxable on the income from stock given by him outright to his wife or minor children, even though the husband donor actively controls and manages the corporation whose stock was so given. In effect the case at bar is authority for such a conclusion and in that respect is contrary to the Clifford and Stuart cases, being the only other family trusts considered by this court.

2. The Tower Case Does Not Control

The lower court in its opinion states that the principle of *Tower vs. Commissioner*, 66 S. Ct. 532, involving a husband and wife partnership controls in a family trust. This court has never so held, but has held to the contrary in its two decisions on family trusts in the Clifford and Stuart cases. In husband and wife partnerships, such as the Tower case, the husband actually remains in control of the corpus under the specific terms of the partnership agreement wherein the husband reserves control and management, as of right. In the case at bar the husband as grantor, reserved no rights or powers to control either the trust res or the income. He was subject to the absolute legal right of the trustees, including his wife as both trustee and beneficiary to remove him as an officer of the corporation at any time. The control of petitioner as grantor which obviously influenced the opinion of the lower court, as being within the principle of the Tower case, was not a real and actual control—as a matter of legal right, as existed in the Tower case, but was a control granted as a matter of judgment by and at the express wish of the trustees who at all times

admittedly had the right and power to remove petitioner as president of the corporation.

The control of petitioner as grantor in the case at bar was no more real or actual than it would have been had he, as donor, transferred a majority of the stock in his company by absolute gift to his wife and minor children with no reservations as to voting rights or otherwise. Unless this court is willing to hold that in such a situation the income from the shares of stock actually given to and issued in the name of the spouse and/or children is taxable to the donor husband, because he continues actively in charge of the corporate affairs as president, then the control of petitioner in the case at bar likewise should not be considered as the basis for taxing income to him from such stock given to and issued in the name of the trustees.

3. Grantor Did Not Remain the Owner of the Trust Property and Is Not Taxable On the Income Therefrom Under Section 22(a) I.R.C.

The facts are undisputed that:

(a) Petitioner as grantor completely transferred title to the trust res (corporate stock), which thereafter was issued in the name of the trustees, was deposited in safety deposit box to which only the trustees had access, and that the income from that res was deposited in a bank account upon which only the trustees could withdrawn funds (R. 55, 65).

(b) This was not a term trust, but was irrevocable and extended even beyond the life of the grantor (R. 86).

(c) The trust indenture contained no reservations of management or control by the grantor over the trust res or the income therefrom, and continued no power of reverter (R. 83-86).

(d) The income from the trust res was not used for support and maintenance of the beneficiaries, as in the Tower case. The grantor continued to support, maintain and educate his family and the record discloses ample income and ability on his part so to do (R. 88, 89, 104).

The Tax Court laid great stress on the testimony which disclosed that two of the trustees were grantor's business associates, that he had the right as president to discharge two of the trustees as employees of the corporation, and that therefore he, according to the opinion of the Tax Court, still dominated and "controlled the business even though a majority of the shares were in the trust" (R. 90). This completely disregards the legal right of the trustees, though discharged as employees, to remove the president from office and from control of the corporation as its active head.

So far as operating the business is concerned, petitioner was the logical man to operate it as president. He created the business and over the years had made it successful. Even though a disinterested corporate trustee has been named in lieu of the three trustees, sound business judgment would have required the corporate trustee to have continued the grantor as president of the business and to that extent in control thereof. Such fact however does not bring this case within the Clifford doctrine as the grantor here

admittedly did not retain any legal control over the corpus or income of the trust. He testified he had no actual control under the trust instrument. Can it be conceived that Mrs. Byerly would not have exercised her powers as trustee for the benefit of herself and minor children in the event that her husband did not continue to properly or successfully operate the business of the corporation, or in the event that he became addicted to drink or as has happened unfortunately in some instances left the family group for others younger and momentarily more attractive. The wife as a co-trustee had actual control of the business through ownership of a majority of its outstanding stock. She controlled therefore the election of the directors and indirectly the officers of the corporation, and with the aid of the State Court would have been able to compel her co-trustees to exercise a genuine discretion in the management of the trust itself and of the business of the corporation; or, on petition, the other trustees could be removed for misconduct, incapacity or other good cause.

In *Kelsey vs. Detroit Trust Co.*, 265 Mich. 358, it was held that independent of any statute, courts of competent jurisdiction, according to the common law, could remove a trustee for any misconduct, incapacity or for other good cause, and could appoint a successor trustee.

Under the following Michigan Statutes, any person interested in the execution of an express trust may petition for the removal of a trustee who violated or threatens to violate his trust, or who for any other cause shall be deemed an unsuitable person to execute the trust and the Court of Chancery in Michigan may remove such trustee, or performance of the trust may be compelled in equity.

M.S.A. Sec. 26.76 (C. L. Mich. '29, 12992);

M.S.A. Sec. 26.114 (C. L. Mich. '29, 13018).

If the opinion of the lower court in the instant case be sound as a matter of law, then in substance the Clifford doctrine has been extended to the point where no father safely can create and establish a long-term irrevocable trust for the benefit of his wife and/or children with respect to corporate stock in his company, even though a disinterested corporate trustee be named. We do not so understand the Clifford decision and we do not believe that it should be so interpreted.

The record discloses (P. 60) that Mrs. Byerly, as trustee, was consulted with reference to plans of the other trustees who obtained her acquiescence. It must be assumed that such consent was obtained from Mrs. Byerly in compliance with the Statutes of Michigan which require that "when a power is vested in several persons, all must unite in its execution," and with the decisions of this State holding that contracts executed by one co-trustee, without consent of the other co-trustee, are invalid, and holding that where several persons are appointed to execute a trust, all must join in its execution.

M.S.A. Sec. 26.129 (C. L. Mich. '29, 13033);

Scott vs. Detroit Young Men's Society Lessee, 1 Dougl. 119, writ of error dismissed, 5 How. (U. S.) 343;

Shaw vs. Canfield, 86 Mich. 1;

Nichols vs. Pospiech, 289 Mich. 324.

To be considered the "owner" under the provisions of Section 22 (a), the grantor must have expressly reserved a measure of control in the trust instrument itself, under the decision of every reported case since and including *Helvering vs. Clifford,* supra. No such control is here reserved by the trust indenture itself, and we submit no such control indirectly is reserved or can be exercised against the wishes of a co-trustee having a substantial and obviously selfish adverse interest.

We repeat that no case other than the one at bar has been brought to our attention involving a long-term family trust which has applied the Clifford doctrine, unless the trust instrument itself expressly reserves to the grantor a substantial measure of control of the management and/or disposition of the corpus and/or income of the trust.

4. The Dobson Case

From the opinion of the lower court, it was apparent that the doctrine of *Dobson vs. Commissioner,* 320 U. S. 489, was invoked as requiring affirmance of The Tax Court's findings of fact that the trust income here in controversy is taxable to the grantor.

We believe the court erred in this respect. Rather we believe that a clear cut question of law exists in the case at bar which was not passed upon by the lower court—namely the admitted fact that the petitioner did not own the trust res, did not reserve any control over the trust res or the income therefrom, nor reserve any power of reverter. Own-

ership and management by the trustees of trust property is peculiarly appropriate for local determination. This court so held in *Helvering vs. Stuart,* 317 U. S. 154.

This court has not yet had occasion to determine whether ownership of trust property is a question of law open to court review within the meaning of the Dobson case. The Second Circuit has held specifically that it is a question of law in the recent case of *L. A. Cushman, Jr. vs. Commissioner,* 153 Fed. (2d) 510. Likewise the Tenth Circuit has so held in *Armstrong vs. Commissioner,* 143 Fed. (2d) 700. The conflict in the Circuits is squarely presented by the instant case. There is a conflict which may only, and should be resolved by this court.

Decisions of this court subsequnt to the Dobson case indicate that the question is not whether The Tax Court within its discretion made a determination of fact, but rather whether, as a matter of law, The Tax Court misconstrued the extent of power conferred by Statute. See *Security Flour Mills Co. vs. Commissioner,* 321 U. S. 281.

In the recent cases of *John Kelly Co. vs. Commissioner,* 66 S. Ct. 299, this court passed upon the effect of the Dobson case as it applied by inference to family trusts, stating at page 304 that the appellate courts can and should pass on the application of Statutes "—where true legal questions arise as in whether an Act applies—to income or estate taxes from trusts—".

The above citations of the interpretation of the Dobson case by this court show that the pure question of law presented by this appeal lies within the domain of judicial

review. The Sixth Circuit erred in declining to review the numerous legal conclusions drawn from the findings of fact of the Tax Court.

(C) CONCLUSION

This court is presented with a sharp conflict between the several circuits on the question of trust ownership. Only this court can resolve the confusion and uncertainty which now exists. The case at bar brings to this court important questions of public interest in the application of the Clifford principle—questions which affect many taxpayers and extensive property interests, particularly with reference to ownership of stock in a closely held corporation where a portion of the stock is held by the wife of the controlling stockholder either outright, or as both trustee and beneficiary.

It is respectfully submitted that outright transfers either by gift to individuals or by gift to trustees, where there are no reservations of control over the res or income therefrom, and no power of reverter, should be considered and passed upon by this court and thereby resolve the present conflict between the circuits and remove or reduce unnecessary future litigation.

Respectfully submitted,

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Dated: July 10th, 1946.

APPENDIX

STATUTES INVOLVED

Internal Revenue Acts of 1936 and 1938, and Internal Revenue Code: (49 Stat. 1657, 1707, 1709, 1725; 52 Stat. 457, 517, 518, 519, 539).

"Sec. 22. GROSS INCOME. (Rev. Acts 1936, 1938 and I.R.C.):

"(a) General Definition.—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever * * *."

"Sec. 162. NET INCOME. (Rev. Acts 1938 and I.R.C.):

"The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that— * * *

"(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the beneficiaries, and the amount of the income collected

by a guardian of an infant which is to be held or distributed as the court may direct, but the amount so allowed as a deduction shall be included in computing the net income of the beneficiaries whether distributed to them or not. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under sub-section (c) of this section in the same or any succeeding taxable year;

"(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary."

"Sec. 166. Revocable Trusts. (Rev. Acts 1936, 1938 and I.R.C.):

"Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor."

"Sec. 167. INCOME FOR THE BENEFIT OF GRANTOR. (Rev. Acts 1936, 1938 and I.R.C):

"(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in Section 23 (c), relating to the so-called 'charitable contribution' deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

"(b) As used in this section, the term 'in the discretion of the grantor' means 'in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question'."

Section 16.130:

"Whenever the father, or the mother, being a widow or living separate from her husband, shall abandon, neglect, or refuse to maintain his or her children, or a husband shall abandon, neglect, or refuse to maintain his wife, leaving any of them chargeable, or likely to become chargeable, upon the county for their support, a superintendent of the poor of the county where such wife or children may be, may seize upon and take immediate possession of the goods, chattels, effects, things in action, and the lands and tenements of any such father, mother or husband, wherever the same may be found in the said county";

Section 16.131:

"Upon the due proof of the facts aforesaid, the said Probate Court shall indorse upon said inventory his approval of the proceedings, and the superintendents of the poor of said county shall then be vested with all the rights and title to the said property, things in action, and effects which the person so abandoning, neglecting or refusing to support as aforesaid, had at the time of seizure." (C. L. '29, 8218.)

Section 26.76:

"Upon the petition or bill of any person interested in the execution of an express trust, and under such regulations as shall be established by the court for that purpose, the court of chancery may remove any trustee who shall have violated or threatened to violate his trust, or who shall be insolvent, or whose insolvency shall be apprehended, or who, for any other cause, shall be deemed an unsuitable person to execute the trust." (C. L. '29, 12992.)

Section 26.114:

"Every trust power, unless its execution or non-execution is made expressly to depend on the will of the grantee, is imperative, and imposes a duty on the grantee, the performance of which may be compelled in equity for the benefit of the parties interested." (C. L. '29, 13018.)

Section 26.129:

"When a power is vested in several persons, all must unite in its execution; but if, previous to such execution, one or more of such persons shall die, the power may be executed by the survivor or survivors." (C. L. '29, 13033.)

Section 27.2101:

"Such division or distribution of a trust estate may be made by a trustee without obtaining the authority of the court as aforesaid, when all the persons who would be entitled to share in the proceeds of the sale of such estate shall consent thereto in writing, and such trustee shall make such division and distribution when all of the parties interested as aforesaid shall so request in writing." (C. L. '29, 15084.)

Section 27.2102:

"When any of the persons entitled to share in the distribution of the proceeds of the sale of such trust estate shall be a minor, or insane, or incompetent to give their consent, or make such request, such division and distribution shall not be made without the authority of the court as aforesaid, unless such minor, insane or incompetent person shall have a general guardian, in which event such general guardian, upon obtaining the authority of the court appointing such guardian to consent to such division and distribution, or request that the same shall

be made by the trustee, shall have the same power and authority to consent to such division and distribution or make request therefor, and agree upon a method of effecting such division and distribution as a person of full age and otherwise competent to act in the premises could do. The authority of the court appointing such guardian to give such consent, or make such request, may be obtained by such guardian filing with such court a petition showing the circumstances which it is deemed renders it to the advantage of such minor, insane or incompetent person to have such distribution or division made." (C. L. '29, 15085.)

Section 27.3178 (209):

"If any minor, who has a father living, has property which is sufficient for his maintenance and education in a manner more expensive than his father can reasonably afford, regard being had to the situation of the father's family and to all the circumstances of the case, the expenses of the education and maintenance of such minor may be defrayed out of the income or principal of his own property in whole or in part, as shall be judged reasonable, and shall be directed by the Probate Court, and the charges therefor may be allowed accordingly in the settlement of the accounts of his guardian."

Section 28.358:

"Any person who deserts and abandons his wife or deserts and abandons his minor children, under seventeen (17) years of age, without providing necessary and proper shelter, food, care and clothing for them and any person who being of sufficient ability shall fail, neglect or refuse to provide necessary and proper shelter, food, care and clothing for his wife or his children under the age of seventeen (17) years, shall be guilty of a felony, punishable by imprisonment in the state prison for not more

than three (3) years, nor less than one (1) year, or by imprisonment in the county jail for not more than one (1) year, and not less than three (3) months."

Section 28.362:

"Where in any decree of divorce, or decree of separate maintenance granted in this state, where personal service is had upon the father of any minor child or children, under the age of seventeen (17) years, the court shall order such father to pay any amount to the clerk or friend of the court for the support of such minor child or children, and said father shall refuse or neglect to pay such amount at the time stated in such order and shall leave the State of Michigan, said father shall be guilty of a felony: Provided, however, if at any time before sentence he shall enter into bond to the people of the State of Michigan, in such penal sum and with such surety or sureties as the court may fix, conditioned that he will comply with the terms of such order, then the court may suspend sentence therein: Provided further, That upon failure of such person to comply with said undertaking he may be ordered to appear before the court and show cause why sentence should not be imposed, whereupon the court may pass sentence, or for good cause shown may modify the order and take a new undertaking and further suspend sentence as may be just and proper." (C. L. Mich. '29, 12781.)

INDEX

CITATIONS

709320—46

In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 298

J. A. BYERLY, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court of the United States (R. 89–93) has not been reported. The opinion of the Circuit Court of Appeals (R. 116–118) is reported at 154 F. 2d 879.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 17, 1946. (R. 115.) Petition for a writ of certiorari was filed on July 15, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Tax Court erred in concluding from the evidence that a trust established by the taxpayer is not sufficiently substantial to warrant taxation of the income from the property to the trust rather than to the taxpayer.

STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

Section 22 (a) of the Revenue Act of 1938, c. 289, 52 Stat. 447, and Section 22 (a) of the Internal Revenue Code (26 U. S. C. 1940 ed., Sec. 22) contain provisions identical with those of the Revenue Act of 1936 above quoted.

STATEMENT

This case involves deficiencies in income tax for the taxable years 1937, 1938, 1939 and 1941,

assessed by the Commissioner of Internal Revenue against the taxpayer, J. A. Byerly, and taxing to him the income of property which he had transferred to a trust. The taxpayer is president of the J. A. Byerly Company, a corporation organized in 1924 to take over his established business. The corporation operates 41 retail food stores. Prior to December 31, 1935, the taxpayer held 16,990 of the 19,250 shares outstanding, the remaining shares being held, until 1939, by employees of the corporation. (R. 82.)

Under date of December 31, 1935, the taxpayer executed a trust indenture by which he transferred 8,100 shares to Mae Ward Byerly, his wife, and Jens M. Beck and Carl O. Uhlman, as trustees (R. 82). The trust instrument (R. 82–86) recited that the taxpayer had accumulated a sizable estate in his own right, by diligent effort and prudent business methods pursued by him throughout the past 35 years or more; that he wished to acknowledge his debt to his family and to assist his sons financially, but deemed it inadvisable to make substantial gifts to inexperienced young men unless control was safeguarded and directed by persons of more mature experience and judgment (R. 82–83).

The beneficiaries of the trust were the taxpayer's wife, Mae Ward Byerly, and his two sons (R. 85), the older of whom reached his majority on November 27, 1941 (R. 82). The trustees were directed to pay the net income in equal

shares to each of the beneficiaries during his lifetime, unless the trustees should deem it advisable to accumulate the income (R. 84). On the death of a beneficiary the remaining beneficiaries were to take his interest, except that if a beneficiary died leaving issue, the issue would take the parent's share *per stirpes.* If all of the beneficiaries died leaving no issue, the trust was to terminate and the trust property was to be distributed to the grantor, if living, or to his heirs. (R. 86.) The trust was to endure for the lifetime of the last surviving named beneficiary, and until the youngest of his issue should reach 21 years of age (R. 86), unless sooner terminated in the discretion of the trustees with the written consent of the beneficiaries, in which event the property was to be transferred to the grantor (R. 85).

The trustees were authorized to sell, assign or transfer any part of the trust property and to deal with it for the benefit of the trust, and to appoint successor trustees (R. 84–85).

The Tax Court found that the trustee J. M. Beck is a director, vice-president and merchandise manager of the corporation; that the taxpayer as president could remove Beck from his position at any time; and that Beck, whose salary increased from $5,000 in 1937 to $12,000, has handled no investments other than those of the trust, except his own (R. 87). The trustee Uhlman was secretary of the corporation; on his death in 1940, George Carruthers was appointed

trustee at Beck's suggestion and with Mrs. Byerly's acquiescence, because of his acquaintance with the food business. Carruthers was not an employee of the corporation but was consulting accountant for the corporation, for the trust and for Byerly individually and prepared their income tax returns. (R. 87.) None of the trustees has ever received any compensation for services as trustee. The meetings of the trustees were informal at odd times; no minutes were kept. As a rule, matters were discussed by Beck and Carruthers at odd times during business hours, Mrs. Byerly being later informed, sometimes by telephone, and acquiescing in their plans. (R. 87.) Beck stated that there were not many decisions to be made and they were rather ordinary (R. 52, 87).

In 1936 the trust acquired 4,639 additional corporate shares from the taxpayer. In 1939 the trust acquired the 2,260 shares held by employees of the company. During 1941 the trust acquired 6,000 additional shares from the corporation, and distributed 4,000 shares equally to the beneficiaries. The trust thereafter held 16,999 shares of the 25,250 outstanding. (R. 87–88.)

The Commissioner of Internal Revenue determined deficiencies in income tax of J. A. Byerly for 1937, 1938, 1939 and 1941 on the ground that (R. 15, 30)—

> By reason of the close family relationship and your choice of trustees, together

> with other rights retained, it appears that you could dominate and control the property and income of the trust during all the years here involved.

The Tax Court sustained his determination.[1] (R. 89–91.) The Circuit Court of Appeals affirmed. (R. 115.)

ARGUMENT

The trust here involved is a trust of shares of stock of a corporation which constituted the taxpayer's business property, accumulated by the taxpayer "by diligent effort and prudent business methods, pursued by him throughout the past thirty-five years or more" (R. 19), the trust being so arranged as to allocate the income within the taxpayer's family group—to his wife and two children who were minors during practically all of the period in question (R. 90). Not ignoring the taxpayer's relinquishment of trust control by the express provisions of the trust instrument, the Tax Court concluded from circumstances outside

[1] Under the same opinion (R. 82–93) the Tax Court, affirmed by the Circuit Court of Appeals (R. 115–118), expunged deficiencies which the Commissioner asserted against the trustees of the J. A. Byerly trust in order to protect the revenues in the event that the deficiencies here asserted against the grantor should not be sustained. Those deficiencies are involved in *Commissioner* v. *J. M. Beck, Mae Ward Byerly and George Caruthers, Trustees, J. A. Byerly Trust*, in which the Commissioner is filing a petition for certiorari in order to prevent the Tax Court's decision becoming final pending the outcome of this case.

the instrument, and the Circuit Court of Appeals affirmed that the taxpayer, notwithstanding the existence of the trust, was still in substantial control of the shares and income; that he still controlled the business and assured the support and maintenance of his family through its income; and that the trust was not sufficiently substantial, under the doctrine of *Helvering* v. *Clifford,* 309 U. S. 331, to warrant taxing the income to the trust rather than to him. (R. 89–91). The findings which gave rise to these conclusions went to the mode of selecting the trustees—selected because they were employees of the corporation which the taxpayer had set up and controlled; that they were at least tractable to the taxpayer's authority as president of the corporation; and that the trustees in fact exercised no discretion independently of the taxpayer in carrying on the trust management. (R. 90, 117.)

The relevancy of those considerations is plain. Thus in *Helvering* v. *Stuart,* 317 U. S. 154, 169, in respect of the John Stuart trusts, the Court observed that "Control of the stocks of the company of which the grantors were executives may have determined the manner of creating the trusts", and remanded that case to the Tax Court to determine whether as a matter of fact such was the situation there. And more recently, it was pointed out that "By the simple expedient of drawing up papers, single tax earnings cannot be

divided into two tax units and surtaxes cannot be thus avoided". *Commissioner* v. *Tower,* decided February 25, 1946.

The petition is silent as to the Tax Court's findings. It neither denies their relevancy nor attacks their evidentiary basis. It asserts simply that because the trustees were invested with broad powers and a majority of the corporate stock, the taxpayer was divested of control and therefore could not remain the owner of the trust income for tax purposes. But this argument overlooks the fact that the trustees in the exercise of their powers "indicated no separate discretion in the management of the Trust" (R. 90) and were dominated by the taxpayer's will, and further that the taxpayer's wife as beneficiary and trustee was acquiescent in their operations (R. 87), and the other beneficiaries were minors and not disposed to object. It is obvious that the taxpayer was as much in control as before. The case turns wholly on the sufficiency of the evidence to sustain the pertinent findings, and upon the Tax Court's assessment of the likelihood that the trustees and beneficiaries would or would not enforce the instrument according to its terms. Even if the present case were not so wholly dependent upon its factual circumstances, the process of applying the *Clifford* doctrine to specific factual situations is clearly within the province of the Tax Court. *Helvering* v. *Stuart, supra,* pp. 167, 169; *Helver-*

ing v. *Clifford, supra,* pp. 336, 338; *Dobson* v. *Commissioner,* 320 U. S. 489, 501; *Commissioner* v. *Tower, supra.*

The decision below, affirming the decision of the Tax Court, is not in conflict with the decisions of the Circuit Courts of Appeals in *Commissioner* v. *Branch,* 114 F. 2d 985 (C. C. A. 1st), and *Commissioner* v. *Betts,* 123 F. 2d 534 (C. C. A. 7th) (Pet. 6), where on somewhat different facts the decisions of the Tax Court against taxing the trust grantor were affirmed. In *Cushman* v. *Commissioner,* 153 F. 2d 510 (C. C. A. 2d), and *Phipps* v. *Commissioner,* 137 F. 2d 141 (C. C. A. 2d), also claimed to be in conflict (Pet. 4, 6), the court rested its decision on the ground, primarily, that powers which the grantor reserved to himself as trustee were fiduciary powers controllable by a court of equity at the instance of the beneficiaries. This consideration is hardly applicable where the actualities of the situation show that the trustees' powers have not been taken seriously by the parties to the trust either in its creation or operation. The decision in *Armstrong* v. *Commissioner,* 143 F. 2d 700 (C. C. A. 10th) (Pet. 6), like the other cases above-cited, also rests upon the particular weight given by the court to various inferences derived from the facts, as witness the same court's contrary ruling, shortly afterward, in a similar situation in *Losh* v. *Commissioner,* 145 F. 2d 456 (C. C. A. 10th).

CONCLUSION

The decision rests wholly upon its peculiar facts and is within the competence of the Tax Court. The petition presents no basis for a writ of certiorari, and should be denied.

Respectfully submitted,

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